IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LORI TESKA,

Plaintiff,

vs.

JESSIE RASMUSSEN, individually and as DIRECTOR OF THE DEPARTMENT OF HUMAN SERVICES, and MARY KAY RENKEN, individually and as REPRESENTATIVE OF THE IOWA DEPARTMENT OF HUMAN SERVICES and DEPARTMENT OF HUMAN SERVICES,

Defendants.

No. C00-4093-MWB

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND BACKGROUND

A. Procedural Background

Plaintiff Lori Teska filed this lawsuit on August 28, 2000, against defendants Jessie Rasmussen and Mary Kay Renken in both their individual and official capacities. Teska alleges that her daughter C.T. was placed in foster care due to defendants' actions and her parental rights to C.T. were subsequently terminated by an Iowa State District Court at defendants' urging. Teska further alleges that C.T. came under the jurisdiction of the Iowa court as a result of the mistaken belief that C.T.'s parents had broken her arm and that by the time that it was discovered that Teska was not responsible for C.T.'s broken arm, C.T. had been out of Teska's home long enough to support termination of Teska's parental rights under Iowa Code § 232.116(1)(g).

In Count I of her complaint, Teska asserts a claim under 42 U.S.C. § 1983 against both defendants and alleges that defendants violated her Constitutional rights and thereby caused the termination of Teska's parental rights.[1] In Count II, Teska asserts a claim under 42 U.S.C. § 1983(3) against both defendants and alleges that defendants conspired to violate her Constitutional Right to equal protection and other Constitutional rights and

[1]Plaintiff Teska does not identify in her complaint what particular constitutional rights were violated by defendants.

thereby caused the termination of Teska's parental rights.[2] In Count III, Teska alleges that both defendants were negligent in failing to properly supervise case workers. In Count IV, Teska alleges a claim for negligent infliction of emotional distress against both defendants on the ground that the negligence of defendants in failing to develop and implement practices, along with their failure to recruit, train, supervise, and employ Iowa Department of Human Services workers resulted in the termination of her parental rights.

In Count V, Teska alleges a claim for negligence against both defendants on the ground that the negligence of defendants in failing to develop and implement practices, along with their failure to recruit, train, supervise, and employ Iowa Department of Human Services workers resulted in the termination of her parental rights. In Count VI, Teska alleges that both defendants acted in reckless disregard of Iowa law and their duty to properly supervise and provide services to her, resulting in the termination of Teska's parental rights. In Count VII, Teska asserts that the Iowa Department of Human services is responsible for the actions of defendants under the theory of respondeat superior.

Defendants have moved for summary judgment on all of plaintiffs claims. The court turns first to a discussion of the undisputed facts as shown by the record and the parties' submissions, then to consideration of the standards applicable to motions for summary judgment, and, finally, to the legal analysis of whether defendants are entitled to summary judgment on any of the claims at issue in this litigation.

B. Factual Background

The record reveals that the following facts are undisputed.

C.T. was born on August 21, 1997. On January 20, 1998, C.T. was brought to the

[2]Plaintiff Teska again does not specify what other constitutional rights were violated by defendants.

emergency room at Marian Health Center by her parents Lori Teska and Donald Teska. An emergency room doctor, Dr. Hardin, determined that C.T. had a transverse fracture of her lower right arm. Initially, neither parent could explain C.T.'s injury. C.T.'s parents subsequently disclosed that C.T. had been in an automobile accident with Lori on December 12, 1997. Dr. Hardin diagnosed that C.T.'s injury was not older than two days.

Law enforcement and the Iowa Department of Human Services were contacted as a result of C.T.'s injury. An investigation by Hank Mobley, a Child Protection Worker, was then conducted. This investigation resulted in a report placing C.T. on the Central Abuse Registry as a victim of physical abuse. The report did not identify the abuser.

On January 21, 1998, C.T. was removed from her parents custody by law enforcement officers pursuant to Iowa Code § 232.79. On January 23, 1998, a Child In Need Of Assistance petition was filed in the Juvenile Court For Woodbury County, Iowa. On August 31, 1998, C.T. was adjudicated as a child in need of assistance by the Iowa juvenile court. The juvenile court concluded that the allegations of physical abuse under Iowa Code § 232.2(6)(n) could not be sustained because "[b]ased on the evidence presented, there is no clear and convincing evidence as to how the injury happened." *In re C.T.*, Juv. No. 9234, at p. 3 (Iowa Juv. Ct. Aug. 31, 1998). The Iowa juvenile court, however, concluded that C.T. was a child in need of assistance, pursuant to Iowa Code § 232.6(c)(2), based on C.T.'s parents failure to exercise a reasonable degree of care in supervising her. *In re C.T.*, Juv. No. 9234, at p. 3.[3]

Mary Kay Renken is a social worker with the Iowa Department of Human Services. Renken was the Iowa Department of Human Services's case manager assigned to the case of Lori Teska and her daughter, C.T., beginning in January 1998. As a case manager,

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[3]On August 28, 1998, Lori was charged with criminal child endangerment. On December 30, 1998, the charges were dismissed at the State of Iowa's request.

Renken's responsibilities included assessing the family's needs and strengths and developing a service plan to serve the family within the guidelines of the Iowa Department of Human Services. The services provided to Lori included a psychosocial evaluation, a psychological evaluation, individual therapy, parent skill development, and supervised visitation. Services were provided by Visinet Iowa, Crittenton Family Development Center, Dr. Michael Baker, Dr. Susan Caldwell, Jim Anderson, and Stephanie Knobbe. These providers performed evaluations and made recommendations regarding Lori's parenting. Through these evaluations and reports, Renken was aware that both Lori and Donald had mental limitations and attempted to structure services for them based on their limitations.

On July 6, 1999, a petition for termination of both Lori and Donald's parental rights was filed. On July 16, 1999, Renken recommended the termination of both Lori and Donald's parental rights. On September 15, 1999, the Iowa juvenile court, following a hearing, terminated Lori's parental rights, but not those of Donald. *In re C.T.*, Juv. No. 9234, at p. 13 (Iowa Juv. Ct. Sept. 15, 1999). In arriving at its decision, the Iowa juvenile court noted that "[a]lthough the Court found in its adjudicatory order that this fracture was not the result of a car accident in December, 1997, the evidence before the Court at this time would suggest that the injury may have been the result of the car accident." *Id.* at p. 4. The Iowa juvenile court, nonetheless, found that:

> At this time Lori is not able to met [sic] [C.T.]'s daily needs. Lori did obtain additional services on her own by completing the Nurturing Program as well as two nutrition and health education programs. Despite these services and the services offered through the Department of Human Services, Lori is still not able to care for [C.T.]. The Court does not believe in regards to Lori that additional time and services would be sufficient to create a situation in which [C.T.] could be placed into her care. She has been unable to internalize the problems she faces. She continues to focus on herself and her own needs and not the needs of [C.T.]. Lori's own statement during her testimony that she did not feel that she needed any services to

> begin with but did get some benefit from them is the most revealing description of the problem with Lori. She has great difficulty meeting her own emotional needs. It is not possible for her to meet [C.T.]'s. She does not appear to have the motivation to make the changes that are necessary.

Id. at p. 8. The Iowa juvenile court's determination to terminate the parental rights of Lori was affirmed by the Iowa Court of Appeals on May 10, 2000. *See In re C.B.T.*, No. 0-130/99-1579, at 9 (Iowa Ct. App. May 10, 2000). The Iowa Court of appeals noted that Lori had not raised the issue that she was entitled to special accommodations because of her mental disability. *Id.* at 9.

Defendant Jesse Rasmussen has been the Director of the Iowa Department of Human Services since April of 1999, and works in Des Moines, Iowa. Renken has no recollection of any personal involvement in this case by Rasmussen.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to FED. R. CIV. P. 56 in a number of prior decisions. *See, e.g.*, *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 61 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). Thus, the court will not consider those standards in detail here. Suffice it to say

that Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to

judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same). With these standards in mind, the court turns to consideration of the parties' cross-motions for summary judgment.

B. Analysis Of Claims

1. Eleventh Amendment

Defendants seek dismissal of the claims against the Iowa Department of Human Services and the individual defendants, in their official capacity only, on the ground that the claims are all barred under the Eleventh Amendment to the United States Constitution.

a. The constitutional bar

The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U. S. CONST. amend. XI. The Eleventh Amendment, as interpreted by the Supreme Court, is born of the recognition of the "vital role of the doctrine of sovereign immunity in our federal system":

> A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued. As Justice Marshall well has noted, "because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of federal judicial power has long been considered to be appropriate in a case such as this." *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973)

> (concurring in result). Accordingly, in deciding this case we must be guided by "[t]he principles of federalism that inform Eleventh Amendment doctrine." *Hutto v. Finney*, 437 U.S. 678, 691 (1978).

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99-100 (1984) (footnotes omitted; emphasis in the original). The Eighth Circuit Court of Appeals has observed,

> Almost since its enactment, courts have struggled with the boundaries created by this Amendment. These endeavors have resulted in the creation of many legal fictions which control the Eleventh Amendment's interpretation. For example, although the Amendment's terms bar only suits against states by non-residents, an early case established that the Eleventh Amendment also prohibits suits against a state by that state's residents. *Hans v. Louisiana*, 134 U.S. 1, 15-16, 10 S. Ct. 504, 507-08, 33 L. Ed. 842 (1890). The Amendment's terms address only federal suits in law and equity, yet it has been construed to also bar certain admiralty suits. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17, 102 S. Ct. 3304, 3313-14 n.17, 73 L. Ed. 2d 1057 (1982). Other cases have interpreted the Eleventh Amendment to prohibit suits against a state by both foreign nations and Indian tribes. *Monaco v. Mississippi*, 292 U.S. 313, 330, 54 S. Ct. 745, 751, 78 L. Ed. 1282 (1934); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1141 (8th Cir. 1974).

Thomas v. FAG Bearings Corp., 50 F.3d 502, 504-05 (8th Cir. 1995) (footnote omitted); *see also Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 968 (8th Cir. 2000) ("The Eleventh Amendment bars federal court jurisdiction over state law claims against unconsenting states or state officials when the state is the real, substantial party in interest, regardless of the remedy sought."); *Williams v. Missouri*, 973 F.2d 599, 599-600 (8th Cir. 1992) ("The Eleventh Amendment bars suits against a State by citizens of that same State in federal court," citing *Papasan v. Allain*, 478 U.S. 265, 276 (1986)).

Although the bar of the Eleventh Amendment to suits against the state itself "'exists whether the relief sought is legal or equitable,'" *Williams*, 973 F.2d at 600 (quoting

Papasan, 478 U.S. at 276), the Eighth Circuit Court of Appeals has noted that "[o]f course, legal fictions have also eroded Eleventh Amendment immunity by, among other things, permitting suits against state officials for injunctive and prospective relief." *Thomas*, 50 F.3d at 505 (citing *Edelman v. Jordan*, 415 U.S. 651, 663-64 (1974)); *see also Glick v. Henderson*, 855 F.2d 536, 540 (8th Cir. 1988) (recognizing the exception for suits against state officials for injunctive relief, citing *Pennhurst*, 465 U.S. at 104, and *Ex Parte Young*, 209 U.S. 123 (1908), and explaining "that this exception was based on the theory that because a state is without power to authorize a state official to act in violation of federal law, any state official taking such actions is acting beyond his official authority and is thereby 'stripped of his official or representative character,'" quoting *Pennhurst*, 465 U.S. at 104).

b. Suit against the "state"

In *Thomas*, the Eighth Circuit Court of Appeals also provided an outline of the analysis to be used in interpreting the scope of Eleventh Amendment immunity:

> Given the nature of Eleventh Amendment jurisprudence, we reject a "plain words" interpretation of the Eleventh Amendment. . . .
>
> Rather than look to the Amendment's literal terms, we will more generally examine Eleventh Amendment jurisprudence to determine precisely what qualifies as a suit against the state. "'What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of Justice.'" *Missouri v. Fiske*, 290 U.S. 18, 26, 54 S. Ct. 18, 21, 78 L. Ed. 145 (1933) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 407, 5 L. Ed. 257 (1821)). A later articulation of the Eleventh Amendment's reach characterizes a suit against the state more concretely. A suit is against the state if "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Pennhurst State Sch. &*

> *Hosp. v. Halderman*, 465 U.S. 89, 101 n.11, 104 S. Ct. 900, 908-09 n.11, 79 L. Ed. 2d 67 (1984) (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 1006, 10 L. Ed. 2d 15 (1963)).

Thomas, 50 F.3d at 505 (footnotes omitted). In the present case, it is undisputed that the State of Iowa has the right to assert Eleventh Amendment immunity. It is also readily apparent, applying the standards stated in *Thomas*, this action is a "suit" within the meaning of the Eleventh Amendment. *Thomas*, 50 F.3d at 505. Plaintiff Teska is prosecuting a claim in this court of justice, *id.* (citing *Fiske*, 290 U.S. at 26, in turn citing *Cohens*, 6 Wheat. at 407), and a judgment on her claims would indeed "expend itself on the public treasury or domain, or interfere with the public administration,' or . . . the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Thomas*, 50 F.3d at 505 (quoting *Pennhurst State Sch. & Hosp.*, 465 U.S. at 101 n.11, in turn quoting *Dugan*, 372 U.S. at 620). The court must therefore consider whether the claims against the Iowa Department of Human Services and the individual defendants are barred by the Eleventh Amendment.

c. Eleventh Amendment immunity and exceptions to it

"When a state is directly sued in federal court, it must be dismissed from litigation upon its assertion of Eleventh Amendment immunity unless one of two well-established exceptions exists." *Barnes v. Missouri*, 960 F.2d 63, 64 (8th Cir. 1992); *see also Egerdahl v. Hibbing Community College*, 72 F.3d 615, 619 (8th Cir. 1995); *Williams*, 973 F.2d at 600 (quoting *Barnes* for this proposition). Those two exceptions are "congressional abrogation" and "state waiver." *Egerdahl*, 72 F.3d at 619; *Williams*, 973 F.2d at 600; *Barnes*, 960 F.2d at 64.

i. Congressional abrogation. As to congressional abrogation, in *Pennhurst*, the Supreme Court concluded that "Congress has power with respect to rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity." *Pennhurst*, 465

U.S. at 99; *see also Egerdahl*, 72 F.3d at 619 ("Congress may pass legislation under the Commerce Clause or Section 5 of the Fourteenth Amendment to override states' Eleventh Amendment Immunity," citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-23 (1989), and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)); *Glick*, 855 F.2d at 540 (quoting *Pennhurst*). This exception applies only when there is "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several states.'" *Pennhurst*, 465 U.S. at 99; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) ("'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute,'" quoting *Dellmuth v. Muth*, 491 U.S. 223, 229-30 (1989)); *accord Egerdahl*, 72 F.3d at 619 ("Congress must make its intention to abrogate states' immunity 'unmistakably clear in the language of the statute,'" quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985); *Glick*, 855 F.2d at 540. To ascertain whether Congress abrogated the states' Eleventh Amendment immunity in enacting legislation, a court must examine two issues: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe of Florida*, 517 U.S. at 55 (internal citations omitted) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)); *see also Dellmuth*, 491 U.S. at 229-30; *Atascadero State Hosp.*, 473 U.S. at 243.[4] This exception, however, is inapplicable here

[4]In *Seminole Tribe of Florida*, the United States Supreme Court held that Congress did not possess the authority under the Indian Commerce Clause to abrogate Eleventh Amendment state sovereign immunity. *Seminole Tribe of Florida*, 517 U.S. at 47. In doing so, the Court overruled its prior decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), where it had held that the Commerce Clause gave Congress the power to abrogate the states' Eleventh Amendment immunity, in addition to its power under section five of the Fourteenth Amendment. *See Seminole Tribe of Florida*, 517 U.S. at 65. After *Seminole Tribe of Florida*, section five of the Fourteenth Amendment remains as the sole authority (continued…)

since plaintiff Teska has not asserted the existence of such a congressional abrogation. Thus, the court will turn its attention to the state waiver exception.

ii. State waiver. Turning to the "state waiver" exception, the Eighth Circuit Court of Appeals has reiterated that where a state or state agency waives or intends to waive its immunity, "of course, no Eleventh Amendment problem exists." *Thomas*, 50 F.3d at 505. However, just as congressional abrogation requires unmistakable language in the federal statute, "[a]s a general matter, only unmistakable and explicit waiver of Eleventh Amendment immunity" by the state will suffice. *Id.* at 506 (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990), *Atascadero State Hosp.*, 473 U.S. at 241, and *Edelman*, 415 U.S. at 673); *Angela R. ex rel. Hesselbein v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993) ("While Eleventh Amendment immunity can be waived, such waiver must be unequivocally expressed," citing *Edelman*, 415 U.S. at 673).

In order to constitute a waiver of Eleventh Amendment immunity by the state, a state statute "'must specify the State's intention to subject itself to suit in federal court." *Angela R.*, 999 F.3d at 325 (quoting *Atascadero State Hosp.*, 473 U.S. at 241, and also citing *Feeney*, 495 U.S. at 306-08, and *Burk v. Beene*, 948 F.2d 489, 493-94). Furthermore, the Eighth Circuit Court of Appeals has described the Supreme Court's test of waiver as "stringent." *Hankins v. Finnel*, 964 F.2d 853, 856 (8th Cir.), *cert. denied sub nom. Missouri v. Hankins*, 506 U.S. 1013 (1992); *Burk v. Beene*, 948 F.2d 489, 493 (8th Cir. 1991). As the Eighth Circuit Court of Appeals has reemphasized,

> A State "is deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the test as will leave no reason for any other reasonable construction."

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[4](…continued)
by which Congress may abrogate the States' immunity. *Id.* at 60.

Cooper, 226 F.3d at 969 (quoting *Atascadero*, 473 U.S. at 239-40); *see Hankins*, 964 F.2d at 856 (same) (quoting *Atascadero*, 473 U.S. at 239-40).

The Eighth Circuit Court of Appeals has been reluctant to find waivers meeting the "stringent" standard required. For example, in *Angela R.*, the Eighth Circuit Court of Appeals found that an Arkansas statute that acknowledged the pendency of the case then before the federal court nonetheless fell "considerably short of the 'unequivocal waiver' of Eleventh Amendment immunity that *Atascadero* requires." *Angela R.*, 999 F.3d at 325. The court therefore found that the Eleventh Amendment barred an action to enforce a settlement agreement in federal court. *Id.* In *Burk*, a state indemnification statute that referred to damages awards by federal courts was nonetheless read *not* to provide "a clear and unequivocal waiver of the state's Eleventh Amendment immunity." *Burk*, 948 F.3d at 493. The statute in question in *Burk* provided that

> [t]he State of Arkansas shall pay actual, but not punitive, damages adjudged by a state or federal court . . . against officers or employees of the State of Arkansas . . . based on an act or omission by the officer or employee while acting without malice and in good faith within the course and scope of his employment and in the performance of his official duties.

ARK. CODE ANN. § 21-9-203(a) (Michie 1987); *Burk*, 948 F.2d at 493 n.3 (quoting the Arkansas statute). The court rejected the plaintiff's argument that it would be unnecessary for the legislature to provide for indemnification for liability in federal lawsuits if in fact the state had not waived its immunity to suits for damages in federal court. *Burk*, 948 F.2d at 493. The lack of unequivocal waiver in this indemnification statute was bolstered by the court's finding that another statute provided "quite explicitly, that state officials *are* entitled to immunity in ordinary circumstances." *Id.* (citing ARK. CODE ANN. § 19-10-305(a) (Michie Supp. 1991), with emphasis in the original). Waivers may also be "partial" rather than "general." *Hankins*, 964 F.2d at 856 (citing cases). Thus, in *Hankins*, the court found that the state had waived its immunity only as to the judgment in the case by participating

in a trial of the case on the merits. *Id.* Similarly, in *Barnes*, the court found that a waiver of immunity in a Missouri statute, MO. REV. STAT. § 537.600, did not include the types of claims raised by the plaintiff, which were claims for violation of the First Amendment, the Fourteenth Amendment, and the First Amendment Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-6(a), arising from the defendants obtaining the plaintiff's arrest record and disseminating it to the public. *Barnes*, 960 F.2d at 65. More recently, in *Cooper*, the Eighth Circuit Court of Appeals found that the fact that Minnesota waived its immunity to suit in Minnesota's state courts was insufficient to waive its Eleventh Amendment immunity. *Cooper*, 226 F.3d at 969.

The court therefore returns to Supreme Court precedent to identify language that would be sufficiently explicit to constitute a state's waiver of its Eleventh Amendment immunity to suits in federal court. In *Feeney*, the Court found that both New York and New Jersey had "expressly consent[ed] to suit in expansive terms" with language that the states "consent to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . . against the Port of New York Authority." *Feeney*, 495 U.S. at 306 (citing N.J. STAT. ANN. § 32:1-157 (West 1963), and N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979)). However, the Court rejected the assertion that this expansive consent could be interpreted to encompass suit in federal court as well as state court, because "such a broadly framed provision may also reflect only a State's consent to suit in its own courts." *Id.* The Court nonetheless found an express waiver by resolving any ambiguity in the consent to suit provision by looking to the statutory venue provision. *Id.* at 307. That venue provision "expressly indicated that the States' consent to suit extends to suit in federal court," because the provision provided that "'[t]he foregoing consent [of N.J. STAT. ANN. § 32:1-157 (West 1963); N.Y. UNCONSOL. LAWS § 7101 (McKinney 1979)] is granted on the condition that venue . . . shall be laid within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port

of New York District.'" *Feeney*, 495 U.S. at 307 (quoting N.J. STAT. ANN. § 32:1-162 (West 1963); N.Y. UNCONSOL. LAWS § 7106 (McKinney 1979)). The Court found that this provision "eliminates the danger . . . that federal courts may mistake a provision intended to allow suit in a State's own courts for a waiver of Eleventh Amendment Immunity." *Id.* The court rejected an argument that a venue provision could not shape the Court's construction of a consent to suit provision, because the venue provision "directly indicates the extent of the States' waiver embodied in the consent provision." *Id.* Furthermore,

> The States passed the venue and consent to suit provisions as portions of the same Acts that set forth the nature, timing, and extent of the States' consent to suit. The venue provision expressly refers to and qualifies the more general consent to suit provision. Additionally, issues of venue are closely related to those concerning sovereign immunity, as this Court has indicated by emphasizing that '[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School and Hospital v. Halderman*, 465 U.S., at 99.

Feeney, 495 U.S. at 307-08.

d. Waiver in this case.

The issue of waiver in this case turns on the waiver contained in the Iowa State Tort Claims Act. *See* IOWA CODE § 669.4. Iowa Code § 669.4 provides that:

> The district court of the state of Iowa for the district in which the plaintiff is resident or in which the act or omission complained of occurred, or where the act or omission occurred outside of Iowa and the plaintiff is a nonresident, the Polk county district court has exclusive jurisdiction to hear, determine, and render judgment on any suit or claim as defined in this chapter. However, the laws and rules of civil procedure of this state on change of place of trial apply to such suits.
>
> The state shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the state shall not be liable for interest prior to judgment or for

> punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the state were a private litigant.
>
> The immunity of the state from suit and liability is waived to the extent provided in this chapter.
>
> A suit is commenced under this chapter by serving the attorney general or the attorney general's duly authorized delegate in charge of the tort claims division by service of an original notice. The state shall have thirty days within which to enter its general or special appearance.
>
> If suit is commenced against an employee of the state pursuant to the provisions of this chapter, an original notice shall be served upon the employee in addition to the requirements of this section. The employee of the state shall have the same period to enter a general or special appearance as the state.

IOWA CODE § 669.

The plain language of section 669.4 limits waiver of Iowa's sovereign immunity to lawsuits brought in Iowa state courts. It is important to note that the Supreme Court recognized in *Feeney* that a state can create a limited waiver of this immunity by consenting to be sued in its own state courts without waiving its Eleventh Amendment immunity from suit in federal courts. *Feeney*, 495 U.S. at 306 ("A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts," quoting *Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981)); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 473-74 (1987) (noting that state does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in state court); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984) (noting that Court has consistently held that state's waiver of sovereign immunity in state courts is not waiver of Eleventh Amendment immunity in federal courts); *In re Secretary of Dep't of Crime Control and Public Safety*, 7 F.3d 1140, 1147 (4th Cir. 1993) (quoting *Feeney*, 495 U.S. at 305-06), *cert. denied sub nom. Barfield*

v. Secretary, North Carolina Dep't of Crime Control, 511 U.S. 1109 (1994); *Harrison v. Hickel*, 6 F.3d 1347, 1354 (9th Cir. 1993) (quoting *Feeney*, 495 U.S. at 305-06); *Kroll v. Board of Trustees of Univ. of Ill.*, 934 F.2d 904, 910 (7th Cir.) (same), *cert. denied*, 502 U.S. 941 (1991); *Riggle v. California*, 577 F.2d 579, 585 (9th Cir. 1978) ("A state may waive immunity from suit in its own courts without thereby waiving its Eleventh Amendment immunity from suit in federal courts."); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2036 (1997) ("States have real and vital interests in preferring their own forum [over a federal forum] in suits brought against them, interests that ought not to be disregarded based upon a waiver [of immunity in the state forum]"). Thus, a state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity under federal law. This is precisely the situation with the Iowa State Tort Claims Act.

As was noted above, a state's waiver of its Eleventh Amendment immunity will be found "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Feeney*, 495 U.S. at 305. The Iowa State Tort Claims Act provides that Iowa state district courts have exclusive jurisdiction to determine any suit or tort claim under that act. Absent reference to either Eleventh Amendment immunity or suit in *federal* court, the court cannot find that § 669.4 provides an express waiver of Eleventh Amendment immunity to suits against the state in federal court. *See Angela R.*, 999 F.3d at 325 (the state statute "'must specify the State's intention to subject itself to suit in federal court,'" quoting *Atascadero State Hosp.*, 473 U.S. at 241, and also citing *Feeney*, 495 U.S. at 306-08, and *Burk v. Beene*, 948 F.2d 489, 493-94). As a result, the court cannot conclude that the State of Iowa has waived its Eleventh Amendment immunity in the Iowa State Tort Claims Act since that act does not expressly specify the state's intent to subject itself to suit in federal court. Therefore, this portion of defendants' motion for summary judgment is granted and the claims against

defendant Iowa Department of Human Services are dismissed. Defendants Rasmussen and Renken are dismissed from Counts III, IV, V, and VI based on Iowa State Tort Claims Act section 669.4, which limits waiver of Iowa's sovereign immunity to lawsuits brought in Iowa state courts. In addition, Rasmussen and Renken, in their official capacities only, are dismissed from Counts I and II based on Eleventh Amendment immunity.

2. Section 1983 Claims

The court next takes up plaintiff Teska's claims that defendants Rasmussen and Renken, in their individual capacity, violated her constitutional rights. Defendants contend that Teska's § 1983 claims fail because Teska cannot connect them to either the investigation of C.T.'s broken arm or the adjudication concerning her broken arm.

With respect to defendant Rasmussen, who was sued in her individual capacity and in her official capacity as director of the Iowa Department of Human Services, Teska has not identified any specific or concrete facts supporting her claim that she caused a deprivation of Teska's constitutional rights. Indeed, in both of the affidavits put forward by Teska in resistance to defendants' motion for summary judgment, it is conceded that she had no personal involvement in Teska's case. Joe Sponder, the father of Lori Teska, avers in his affidavit that: "So maybe Jessie Rasmussen didn't have any personal involvement in this case but as head of the Department of Human services she should have been involved." Sponder Aff. at ¶ 12. Similarly, Teska declares in her affidavit that: "I realize that Jessie Rasmussen wasn't the direct case worker but she was still the head of the Department of Human Services. She should have been making sure that people who work for her were doing their job properly." Teska Aff. at ¶ 14. Thus, Teska's claims against Rasmussen rest on respondeat superior, which is not a proper basis for § 1983 liability. *See Thomason v. SCAN Volunteer Serv., Inc.*, 85 F.3d 1365, 1370 (8th Cir. 1996) (holding in case where parents filed civil rights action following the removal of child by child welfare authorities that where there was no evidence that program director was personally or directly involved

in alleged violation of constitutional rights or that, as supervisor, she knew about allegedly unlawful conduct and facilitated, approved, or deliberately ignored it, summary judgment was properly granted in her favor in § 1983 action); *see also Simmons v. Cook*, 154 F.3d 805, 808 (8th Cir. 1998) (noting that "respondeat superior liability is an improper basis to find an Eighth Amendment violation under section 1983"); *Kulow v. Nix*, 28 F.3d 855, 858 (8th Cir. 1994) (noting that "'[r]espondeat superior is not a basis for liability under 42 U.S.C. § 1983.'") (quoting *Smith v. Marcantonio*, 910 F.2d 500, 502 (8th Cir. 1990)).

Teska has also failed to identify any specific or concrete facts supporting her claim that Renken caused a deprivation of her constitutional rights. "When a moving party has carried its burden under *Rule* 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Here, because defendants have met their initial responsibility of informing the court of the basis for their motions and have identified those portions of the record which show lack of a genuine issue, Teska is "required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. "[A] non-moving party may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial." *Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1107 (8th Cir.1998); *Thomas v. Runyon*, 108 F.3d 957, 959 (8th Cir. 1997); *Ruby v. Springfield R-12 Pub. Sch. Dist.*, 76 F.3d 909, 911 (8th Cir. 1996). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" *Metge v. Baehler*, 762 F.2d 621, 625 (8th

Cir. 1985) (quoting *Impro Prods., Inc. v. Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)), *cert. denied sub nom. Metge v. Bankers Trust Co.*, 474 U.S. 1057 (1986). The necessary proof that Teska must produce is not precisely measurable, but the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allison*, 28 F.3d at 66. Here, Teska has responded to defendants' motion by producing only her affidavit and the affidavit of Sponder. Sponder only attests in his affidavit that: "Mary Kay Renken was involved in the case for the Department but she did nothing. She just stood there and let things happen." Sponder Aff. at ¶ 12. Sponder does not allege what "things" Renken let happen. Teska's own affidavit only mentions Renken once:

> I asked Mary Renken to help me get on housing assistance so that I could get my daughter back. Ms. Renken suggested that Donald move out so that [C.T.] and I could remain in the home. I told that to Donald but when Donald asked Ms. Renken about it, she denied that she ever said it.

Teska Aff. at ¶ 11. Although Teska's complaint makes mention of a conspiracy to deprive her of her equal protection rights, neither her affidavit nor that of Sponder make mention of any conspiracy. Thus, the court concludes that Teska has failed to generate a genuine issue of material fact for trial that Renken caused a deprivation of Teska's constitutional rights by her actions. Therefore, defendants' motion for summary judgment is also granted as to defendant Rasmussen and Renken, in their individual capacities, with respect to Counts I and II.

III. CONCLUSION

Initially, the court concludes that the State of Iowa and its employees have Eleventh Amendment immunity. Thus, the claims against defendant Iowa Department of Human Services are dismissed. Defendants Rasmussen and Renken are dismissed from Counts III,

IV, V, and VI. In addition, defendants Rasmussen and Renken, in their official capacities only, are dismissed from Counts I and II based on Eleventh Amendment immunity. The court further concludes that Teska has failed to generate a genuine issue of material fact for trial that Rasmussen or Renken caused a deprivation of Teska's constitutional rights by their actions. Accordingly, defendants' motion for summary judgment is granted as to all of Teska's claims.

IT IS SO ORDERED.

DATED this 15th day of August, 2001.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA